(5)

No. 90-6105

In The

Supreme Court of the United States

October Term, 1991

JOHN H. EVANS, JR.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

JOINT APPENDIX

KENNETH W. STARR
Solicitor General
U.S. Department
of Justice
Washington, D.C. 20530
(202) 514-2217

Counsel for Respondent

C. MICHAEL ABBOTT
(Appointed by this Court)
100 Peachtree Street, N.W.
Suite 200
Atlanta, Georgia 30303
(404) 525-6666

Counsel for Petitioner

Petition For Writ Of Certiorari Filed October 29, 1990
Certiorari Granted June 3, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

69 pp

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

06/16/88 Indictment

03/09/89 Jury Instructions

03/13/89 Jury verdict of guilty

05/16/89 Judgment and Commitment Order

05/26/89 Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL
	:	INDICTMENT
v.	:	
JOHN H. EVANS, JR.	:	NO. 88-269-A

THE GRAND JURY CHARGES:

COUNT ONE

That on or about July 25, 1986, in the Northern District of Georgia, the defendant, JOHN H. EVANS, JR., did attempt to affect interstate commerce, as defined in Title 18, United States Code, Section 1951(b)(3), by means of extortion and attempted extortion, as defined in Title 18, United States Code, Section 1951(b)(2), that is, the defendant did unlawfully obtain property, that being $8,000.00, from Clifford Cormany, a/k/a Steve Hawkins, with his consent, for the purpose of influencing the defendant's conduct in relation to his position as a public official, which sum of money was not due either the defendant or his office and position, said consent being wrongfully obtained from Clifford Cormany, a/k/a Steve Hawkins, under color of official right, in violation of Title 18, United States Code, Section 1951.

COUNT TWO

That on or about April 15, 1987, in the Northern District of Georgia, JOHN H. EVANS, JR., a resident of Atlanta, Georgia, did willfully make and subscribe, and cause to be made and subscribed, a Form 1040 U.S. Individual Income Tax Return for 1986, in the joint name of John H. & Ina C. Evans which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said 1986 income tax return he did not believe to be true and correct as to every material matter in that the said return stated John H. & Ina C. Evans' adjusted gross income in 1986 was $28,739.67, whereas, as he then and there well knew and believed, the Evans' adjusted gross income in 1986 was at least $35,739.67 as a result of a $7,000 cash payment he received from Clifford Cormany, a/k/a Steve Hawkins.

In violation of Title 26, United States Code Section 7206(1).

A _____ BILL

_____
FOREPERSON

/s/ Robert L. Barr, Jr.
ROBERT L. BARR, JR.
UNITED STATES ATTORNEY

/s/ William P. Gaffney
WILLIAM P. GAFFNEY
ASSISTANT UNITED STATES ATTORNEY

/s/ Wm. L. McKinnon, Jr.
WILLIAM L. McKINNON, JR.
ASSISTANT UNITED STATES ATTORNEY

_____

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA

(Caption Omitted In Printing)

* * *

Jury Instructions

[125] (Jury Absent.)

THE COURT: All right. Let everyone come in who's coming in. If you're going out, you have to go out before I start.

MR. ABBOTT: Judge, may I get Mr. Lotito?

THE COURT: We are going to have to tie you all down to your seats.

(Laughter.)

THE COURT: All right. I'm going to charge the jury. The likelihood is good I will send the written charge out with the jury.

Okay. Bring the jury in, Mr. Jones.

(The jury entered the courtroom.)

THE COURT: All right, members of the jury, if you would kindly give me your attention. It now becomes the duty of the judge to instruct you on the rules of law that you must follow and apply in deciding this case.

When I have finished, you will go to the jury room and begin your discussions, what we sometimes call deliberations. It will be your duty to decide whether the government has proved beyond a reasonable doubt the

specific facts necessary to find the defendant guilty of the crimes charged in the indictment.

[126] Now that you have heard all of the evidence and the argument of counsel, it becomes the duty of the judge to give you the instructions of the court concerning the law applicable to the case.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial. You must not be influenced in any way by either sympathy or prejudice for or against the defendant or the government.

You must also follow the law as I explain it to you, whether you agree with the law or not, and you must follow all of my instructions as a whole. You may not single out one or disregard any of the court's instructions on the law.

As stated to you earlier, the indictment or formal charge by which this case came to this court against the defendant is not evidence of guilt and may not be considered as evidence of guilt.

I charge you that the defendant has come into court and pled not guilty to each of the charges. The effect of his pleading not guilty has placed the burden on the government of proving each element and each offense charged beyond a reasonable doubt.

The defendant is presumed by the law to be innocent. The law does not require a defendant to [127] prove his innocence or produce any evidence at all.

The government has the burden of proving a defendant guilty beyond a reasonable doubt; and if it fails to do so, you must find the defendant not guilty.

Thus, while the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any reasonable doubt concerning the defendant's guilt.

A reasonable doubt is a real doubt, based upon reason and common sense, after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

If you are convinced that the defendant has been proven guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As stated earlier, you must consider only the evidence I have admitted in the case. The term evidence includes the testimony of the witnesses and [128] the exhibits admitted into the record.

Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you.

Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in the case. Except for my instructions to you on

the law, you should disregard anything I have said during the trial in arriving at your own decision concerning the facts.

Concerning the evidence, you may make deductions and reach conclusions which reason and common sense lead you to make, and you should not be concerned about whether the evidence is direct or circumstantial.

Direct evidence is the evidence – direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness.

Circumstantial evidence is the proof of a chain of facts and circumstances indicating that the defendant is either guilty or not guilty.

The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

[129] Now, in saying that you must consider all the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness has had to say and how important that testimony was.

In making that decision, you may believe or disbelieve any witness in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary.

In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions: did the person impress you as one who was telling the truth? Did he or she have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things about which he or she testified? Did he or she appear to understand the questions clearly and answer them directly? Did the witness' testimony differ from the testimony of other witnesses?

You may also ask yourself whether there was [130] evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony which he or she gave before you during the trial.

You should keep in mind, or course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembered it, because people naturally tend to forget some things or remember other things inaccurately.

So, if a witness had made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood. That may depend upon whether it has to do with an important fact or with some – or only with an unimportant detail.

As stated before, a defendant has a right not to testify. If a defendant does testify, however, you should

decide in the same way as that of any other witness whether you believe his testimony.

Now, ladies and gentlemen, during the course of the trial, certain transcripts were admitted into evidence. I charge you that these transcripts have [131] been admitted for the limited and secondary purpose of assisting the jury in following the content of conversations as you listened to the tape recordings and also to help you in identifying speakers.

However, you are specifically instructed that whether the transcript correctly reflects – reflect the content of the conversation or the identity of the speakers is entirely for you to determine.

If the jury should determine that any transcript is in any respect incorrect, you should disregard it to that extent.

When knowledge of a technical subject matter might be helpful to a jury, a person having special training or experience in a technical field, one who is called an expert witness, is permitted to state his or her opinion concerning those technical matters.

Merely because an expert witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as any other witness, it is up to you to decide whether to rely upon it.

In this case, as you know, the indictment charges two separate offenses, also called counts. Now, I will not read the indictment to you at this [132] time because you will be given a copy of the indictment, which will be with you

in the jury room for you to consider and study during your deliberations.

In summary, Count 1 charges that the defendant willfully attempted to extort money under color of official right and in so doing to affect commerce in violation of Title 18, United States Code 19-51.

Count 2 charges that the defendant willfully made and signed a tax return which the defendant did not believe to be true and correct as to every material matter in violation of Title 26, United States Code, 72-06.

In a few minutes, I will explain in more detail the elements of those charges.

You will note that the indictment charges that the offense was committed on or about a certain date. The government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the government proved beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

I will now read to you the defendant's theory of the case. Now, as I read to you the [133] defendant's theory of the case, I will be stating to you the contentions of the defendant as provided to the judge, and not statements of the court or findings of the court as to any fact in this case.

Count 1. In Count 1, John Evans has been charged with accepting money under color of official right. John Evans contends that he accepted the money as a campaign contribution. He further contends that he agreed to assist Steve Hawkins in August 1985 prior to discussions

about the possibility of a campaign contribution being made.

He contends that he agreed to support Hawkins' project because Hawkins and Al Johnson asked him to help and represented to Evans that their project would be a quality project, was legitimate, and would comply with all regulations.

Mr. Evans contends that the assistance he provided was limited to, one, introducing Hawkins to other commissioners; two, checking to see whether other commissioners would support Hawkins' request that the Board of Commissioners waive a two year waiting requirement, or allowing Hawkins to withdraw his zoning request without prejudice; and three, agreeing to support Hawkins' project himself based on Hawkins' representation to Evans that the project [134] would comply with zoning regulations and is a good project.

Evans contends that his activities were all legitimate activities for a commissioner. Evans also contends that he placed limits on all support noting that he would – that he would in the final analysis do what was prudent under the circumstances.

Evans contends he did not attempt to influence the vote of other commissioners nor anyone on the Planning Commission, Planning Department or Community Council.

Evans further contends that he repeatedly told Hawkins that Hawkins needed to meet other commissioners as well as Charlie Coleman of the Planning

Department so Hawkins would explain – so Hawkins would explain the project himself.

Evans says that he did not seek to hide his assistance and told Hawkins to use his name with Coleman.

Evans contends that he never threatened to withhold his support if he did not receive a campaign contribution; that he would have rendered the same assistance to Hawkins regardless of the size of any campaign contribution or whether he received any campaign contribution at all.

[135] Count 2. In Count 2, John Evans has been charged with making a false statement on his income tax return in 1986 by not reporting $7,000 in income – this is continuing the defendant's contentions – John Evans contends that the $7,000 was accepted by him as a campaign contribution, and that he was not required to report it on his income tax return.

He contends further that the entire amount was used to repay a campaign debt to his mother and to partially repay his own loans to his campaign and district office.

Now returning to the charges, the elements of the charges set forth in the indictment. Count 1 of the indictment is brought under a federal statute which is commonly known as the Hobbs Act. This statute, 18 United States Code, Section 19-51(A) provides in pertinent part as follows: whosoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce by robbery or extortion, or attempts, or conspiracy to do so shall be guilty of an offense against the United States.

This statute makes it a federal crime or offense for anyone to extort something from anyone else and in so doing to interfere with interstate [136] commerce.

The defendant can only – the defendant can be found guilty of that offense only if all of the following elements are proved beyond a reasonable doubt: First, that the defendant induced the person described in the indictment to part with property or money; Second, that the defendant did so knowingly and willfully by means of extortion as hereinafter defined; Third, that the extortionate transaction delayed, interrupted or adversely affected interstate commerce.

Now, extortion in a case involving a public official means the wrongful acquisition of property from someone else under color of official right.

Extortion under color or official right is the wrongful taking by a public official of money or property not due him or his office whether or not the taking was accompanied by force, threat or the use of fear. In other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion.

So, if a public official agrees to take or withhold official action or the wrongful purpose of inducing a victim to part with property, such action would constitute extortion even though the official [137] was already duty-bound to take or withhold the action in question.

The government is not required to prove that the defendant directly benefited from any acts of extortion or attempted extortion.

The term "public official" means an elected or appointed official, including a county commissioner.

The term "property" includes money and other intangible things of value.

The term "wrongful" means to obtain property unfairly and unjustly by one having no lawful claim to it.

While it is not necessary to prove that the defendant specifically intended to interfere with interstate commerce, it is necessary concerning this issue that the government prove that the natural consequences of the acts alleged in the indictment would be to affect, delay or obstruct interstate commerce, which means the flow of commerce or business activity between two or more states.

Now, ladies and gentlemen of the jury, I charge you it is also a crime to attempt to violate the Hobbs Act. The essential elements of an attempted offense, each of which the government must prove [138] beyond a reasonable doubt, are, first, that the defendant engaged in conduct which constituted a substantial step toward the commission of the crime; and second, that the defendant did so knowingly and willfully.

To attempt an offense means intentionally to do some act in an effort to bring about or accomplish something the law forbids to be done.

All right, ladies and gentlemen. As regards the elements of interstate commerce, a substantial step would be the embarking on a course of conduct which, if completed, would likely affect, delay or obstruct interstate commerce.

Ladies and gentlemen of the jury, I charge you that it is for the – it is for the court and not the jury to determine whether the government's evidence, if you believe it beyond a reasonable doubt, is sufficient to establish the interstate commerce requirement of the attempted extortion charge.

In this case, the government contends that the evidence shows that if the representation made – representations made by agent Cormany to the defendant had been true, the development project he proposed could have potentially affected interstate commerce.

If Cormany had been a real developer and the [139] rezoning proposal had been a real project, the government contends that there was a potential that the zoning would have been approved and that the project would have been constructed and that interstate commerce would have been affected by the construction of the project.

More specifically, the government contends the following: First, that in July of 1986 and for the following – and the following year and a half, the development of any apartment project or single family home, subdivision in Dekalb County, Georgia, by such a real developer would have required the installation of water pipe, sewage pipe, water meters and copper tubing connecting the water pipes of the apartment or houses to the main Dekalb County water pipe system; second, that these pipes, meters and tubing would have been required to be purchased from The Dekalb County Department of Public Works, which in turn purchased such pipes, meters and tubing in commerce from companies located in states

outside of the state of Georgia; third, that the development of any apartment project or single family home subdivision would have required the use of heavy construction equipment, such as bulldozers, backhoes, front end loaders, dump trucks and tamping machines; [140] and finally, that none of this equipment is manufactured within the state of Georgia, and thus it must be initially manufactured in and obtained from states outside of Georgia.

I charge you that if you believe that the evidence – let's try it again.

I charge you that if you believe that the evidence has established beyond a reasonable doubt the above specific factual contentions of the government. Then as a matter of law I have determined that such evidence would satisfy the interstate commerce requirement for count 1 in the indictment.

If you do not believe that the evidence established beyond a reasonable doubt that the specific factual contentions of the government relating to the interstate commerce requirement, then you must find the defendant not guilty.

The question of whether the Government's factual contentions relating to interstate commerce have been established beyond a reasonable doubt is a matter solely within the discretion of the jury to decide.

The defendant contends that the $8,000 he received from agent Cormany was a campaign contribution. The

solicitation of campaign [141] contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.

However, if a public official demands or accepts money in exchange for specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

A campaign contribution can involve a gift, loan, forgiveness of debt, advance or deposit of money or the conveyance or transfer of anything of value for the purpose of influencing the nomination or the election of any person for office.

Turning to the second count. As I have already stated, count 2 of the indictment charges that the defendant willfully made a false statement on a tax return in violation of Title 26, United States Code, Section 72-06.

This section makes it a federal crime or [142] offense to willfully make and sign a tax return which one does not believe to be true and correct as to every material matter.

The defendant can be found guilty of that offense only if all of the following elements are proved beyond a reasonable doubt: first, that the defendant made, signed

and filed the tax return described in the indictment; second, that the tax return contained or was verified by a written statement – let's read it again: that the tax return contained or was verified by a written declaration that it was made under the penalties of perjury; third, that the tax return was false as to a material matter; fourth, that when the defendant made and signed the tax return, he did so willfully and did not believe that the tax return was true and correct as to every material matter.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty of this charge.

If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

[143] It is not necessary that the government be deprived of any tax by reason of the filing of the return, or that it even be shown that additional tax is due to the government.

A declaration is false if it was untrue when made and was then known to be untrue by the person making it. The declaration contained within a document is false if it was untrue when the document was used and was then known to be untrue by the person using it.

The materiality of the alleged false statement is not a matter for you, the jury, to determine, but it is a question for the court to decide.

The false statement alleged in count 2 of the indictment is that the total income reported on the return did not contain substantial other income allegedly received by the defendant.

You are instructed that the false statements charged in the indictment, if they were made, were material statements. The government need not prove the exact amount of the additional money; it is sufficient if it proves beyond a reasonable doubt that the defendant has had income substantially in excess of the total income he reported on his return.

[144] I instruct you further that if you find that the money the defendant received from Cormany was a campaign contribution and that it was used to pay campaign expenses or debts, the defendant was not required to report it as income on his federal income tax return.

I charge you that the word "willfully" as that term has been used from time to time in these instructions means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids; that is, with bad purpose either to disobey or disregard the law.

I charge you that the word "knowingly" as that term has been used from time to time in these instructions means that the act was voluntarily and intentionally – was voluntarily and intentionally and not because of mistake or accident.

I charge you further that intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind; but you

may infer the defendant's intent from the surrounding circumstances.

You may consider any statement made and done or omitted by the defendant and all other facts and circumstances in evidence which indicate his state of [145] mind.

I charge you further that the defendant contends that he was the victim of entrapment concerning the offense charged in Count 1 of the indictment.

I charge you that this defense is only applicable to the extortion charge as contained in Count 1.

A person is entrapped when he is induced or persuaded by law enforcement officers or their agents to commit a crime that he has no previous intent to commit. The law, as a matter of policy, forbids his conviction in such a case.

However, there is no entrapment where a defendant is ready and willing to break the law and the government agents merely provide what appears to be a favorable opportunity for the defendant to commit the crime.

For example, it is not entrapment for a government agent to pretend to be someone else and to offer either directly or through an informer or other decoy to engage in an unlawful transaction with the defendant.

So, a defendant would not be the victim of entrapment if you should find beyond a reasonable [146] doubt the defendant was ready, willing and able to commit the crime charged in the indictment whenever opportunity was afforded and that the government officer or agent did no more than offer an opportunity.

On the other hand, if the evidence in the case leaves you with a reasonable doubt whether the defendant had any intent to commit the offense except for inducement or persuasion on the part of some government officer or agent, then it is your duty to find the defendant not guilty as to Count 1.

All right, ladies and gentlemen of the jury, a separate offense or crime is charged in each count of the indictment. Each count and the evidence which pertains to it should be considered separately.

The fact that you may find the defendant guilty or not guilty as to one of the offenses should not affect your verdict as to any other offense charged.

I caution you, however, as members of the jury that you are here to determine the evidence in the case – let me try it one more time.

I caution you, members of the jury, that you are here to determine from the evidence in the case whether the defendant is guilty or not guilty.

[147] The defendant is not on trial for any other specific offense not charged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case.

If the defendant is convicted, the matter of punishment is for the judge to determine.

Any verdict that you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict, you must all agree; your deliberations

will be secret and you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss this case with one another in an effort to reach agreement, if you can do so. Each of you must decide this case for yourself, but only after full consideration of the evidence with the other members of the jury.

While you are discussing the case, do not hesitate to reexamine your own opinions and change your mind if you become convinced that you were wrong, but do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, in a real sense, you are judges, judges of the facts. Your only interest is to seek [148] the truth from the evidence in the case.

When you go to the jury room, you should first select one of your number or one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you in court.

We have prepared a form of the verdict to be used as contained on this white sheet, and it has the caption of the case and it's entitled "verdict." I will explain it to you.

All right. It has two entries; each count must be decided, and that's listed separately on the form. It reads this way: We, the jury, find the defendant, and it says "blank" as to Count 1. The next is, we, the jury, find the defendant – and there's a blank – as to Count 2.

All right. You will take this form to the jury room; and if your decision is that the defendant is guilty as to Count 1, then the form of your verdict will be: We, the

jury, find the defendant guilty as to Count 1. If, on the other hand, as to Count 1, your verdict is not guilty, then the form of your verdict will be: We, the jury, find the defendant not guilty as to Count 1.

Moving to Count 2. If your decision is that [149] the defendant is guilty as to Count 2, then the form of your verdict will be: We, the jury, find the defendant guilty as to Count 2. If, on the other hand, as to Count 2 your verdict is – if you find the defendant not guilty, then the form of your verdict will be: We, the jury, find the defendant not guilty as to Count 2.

All right. You will take this verdict form to the jury room; and when you have reached a unanimous decision, you will have your foreperson fill in the verdict, date it and sign it and then return it to the courtroom.

If you should desire to communicate with the judge at any time, please write down your message or question and pass the note to the United States Marshal, or the court security officer, who will promptly return it to the judge for the judge's attention. I will then respond as promptly as possible either by bringing you back in the courtroom or giving you a written answer, as the case might be.

I caution you, however, with regard to any question you might send out that you should never state as to how your are divided numerically, if you are in fact divided, because that is not the business of the judge or the rest of the parties.

[150] All right. Now, you may retire to the jury room. Right now, don't do anything until you have heard from the judge. Just sit at ease back there.

You may retire.

(The jury exited the courtroom.)

THE COURT: All right. I will hear your exceptions to the charges.

MR. BEVER: Yes, there are, Your Honor.

The exceptions specifically will be with respect to government's submitted charges which were not given –

THE COURT: All right, sir.

MR. BEVER: – Those being the following charges: Government's request to charge Number 7 –

THE COURT: Yes, sir.

MR. BEVER: – Which was not given; request to charge Number 10, paragraphs six and seven, which was not given –

THE COURT: All right, sir.

MR. BEVER: – Government's request to charge Number 11, which was not given; the request to charge Number 15, 16, 17 and 18, which were not given; government's request to charge Number 21, which was not given; 23, which was not given; 24, which was not given.

[151] THE COURT: All right, sir.

MR. BEVER: Let me just see, your Honor, if there was – with respect to the Court's charge that was given

and the portion that is on the Hobbs Act, the charge which at the top starts "elements of the crime," on line 24, we except to "adverse effect on interstate commerce," and our position would be it should have been "interrupted," comma, "or affected interstate commerce."

Those are all of the exceptions which the government has.

THE COURT: All right, sir. Thank you, sir. The exceptions are considered, and they are in the record; I will let the charges stand as to the government.

For the Defendant?

MR. LOTITO: Your Honor, first as to defendant's requested instruction 13 as to interstate commerce, we believe that the language in the Flom case should have been included in the interstate commerce instruction as to the coming to rest doctrine; that the issue has been taken from the jury as to – it should be in addition to whether the jury believed the evidence as stated, but there also should be a jury issue as to whether the articles coming into [152] the state from outside of Georgia came to rest –

THE COURT: Yes, sir.

MR. LOTITO: – Within Georgia and were purchased by the Dekalb County people and then resold to potential developers; that that coming to rest doctrine could be an interruption in interstate commerce –

THE COURT: Okay.

MR. LOTITO: – Under Flom.

The second exception as to the definition of "campaign contributions" in the Court's charge, the language

that says that "If a public official demands or accepts money in exchange for specific requested exercises of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution." We believe the language "in exchange for specific requested exercises of his official power" is inconsistent with the holding in Dozier, the Fifth Circuit Case in 1982, 672 Fed.2d 531; that it improperly focuses on the motives of the contributor instead of on the intent of the public official, or the recipient, and the page references were 537 and 542 of the Dozier opinion.

We think the language should have been [153] clearer if it were stated that the money was accepted with an agreement to perform official action as to – in place of the language "Requested exercises of official power."

THE COURT: All right, sir. Yes, I'm familiar with Dozier.

Go ahead.

MR. LOTITO: The third exception that we would make to the charge is that while the court's instruction on defining a campaign contribution was proper, it didn't go quite far enough to the facts of this case.

We believe that "contributions" should have also been defined to include contributions to the – to a district office would have been political contributions, so long as the funds were utilized for the purposes of operating a district office.

THE COURT: All right, sir.

MR. LOTIO: Those would be our exceptions to the Court's charge.

THE COURT: Okay. Thank you.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
V.	Case Number: CR88-269A
JOHN H. EVANS, JR.	Dated May 17, 1989

(Name and Address of Defendant) Michael C. Abbott, Nicholas Lotito and Seth Kirschenbaum
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[[ ] guilty [ ] nolo contendere] as to count(s) ___, and [xx] not guilty as to count(s) 1 & 2.

THERE WAS A:

[[ ] finding [xx] verdict] of guilty as to count(s) 1 & 2.

THERE WAS A:

[[ ] finding [ ] verdict] of not guilty as to count(s)___.

[ ] judgment of acquittal as to count(s)_____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Extortion and Income Tax Fraud, in violation of Title 18, USC, 1951 and Title 26, USC, 7206(1).

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant be sentenced to the Custody of the Attorney for 18 months on count 1 pursuant to Title 18, USC, Sect. 4205(b)(2). As to count 2, 18 months with the execution of sentence suspended and defendant placed on probation for FOUR (4) YEARS with the special conditions that 1) he shall not seek nor hold public office during the probation period and 2) defendant must cooperate with the Internal Revenue Service in getting his tax matters settled.

IT IS FURTHER ORDERED that the defendant may vōluntary [sic] surrender to the institution as desiganted [sic] by the U.S. Marshal no later than June 16, 1989.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify you probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence:

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $100.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 1 & 2 as follows: $50.00 on each count

IT IS FURTHER ORDERED THAT counts ___ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

[X] The Court orders commitment to the custody of the Attorney General and recommends: that the Attorney

General designated the Federal Prison Camp, Atlanta, Georgia as the place of service for this sentence.

May 16, 1989
Date of Imposition of Sentence

/s/ Horace T. Ward
Signature of Judicial Officer

HORACE T. WARD, U.S. DISTRICT JUDGE
Name and Title of Judicial Officer

5/17/89

Date

(Return Omitted In Printing)

United States Court of Appeals
Eleventh Circuit.

UNITED STATES of America,
Plaintiff-Appellee,

v.

John H. EVANS, Jr.,
Defendant-Appellant.

No. 89-8631.

Sept. 6, 1990.

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and COX, Circuit Judges, and DYER, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

John H. Evans, Jr. appeals his conviction on one count of attempted extortion under color of official right in violation of the Hobbs Act, 18 U.S.C. § 1951, and one count of subscribing to a materially false federal income tax return for 1986 in violation of 26 U.S.C. § 7206(1). We affirm his convictions on both counts.

BACKGROUND

In early 1985, Clifford Cormany, Jr. ("Cormany"), a special agent with the Federal Bureau of Investigation ("F.B.I.") was assigned to Atlanta to assist in conducting an undercover investigation, to be known as "Operation Vespine," into allegations of public corruption in the Atlanta area, particularly in the area of rezoning of properties. Using the identity of "Steve Hawkins," Cormany represented himself, as a land developer of the company

WDH, who had recently moved to the Atlanta area. Cormany told other people that he represented a group of investors that was considering developing various land projects in DeKalb County.

In March of 1985, Albert E. Johnson, who was a subject of the investigation,[1] arranged a meeting between Cormany and John H. Evans, a member of the Board of Commissioners in DeKalb County. During this meeting, Johnson told Evans that Cormany's investment group was looking for assistance with matters related to rezoning and variances.

Subsequently, between August, 1985, and October, 1986, a series of meetings and telephone conversations between Evans and Cormany ensued. Almost all of these meetings and conversations were videotaped or audio taped, and they formed a substantial part of the evidence presented by the government at trial.

During the first of these meetings, in August of 1985, Evans was informed by Johnson and Cormany that Cormany wanted to let his investment group know that it had a "leg up" on other developers in DeKalb County. He aimed to achieve this "leg up" by letting the developers know that WDH was associated with the bodies that governed such things as zoning requests. Evans agreed to help set up meetings for Cormany and Johnson with other commissioners.

---

[1] Johnson did not learn of Cormany's true identity until November of 1985, at which point Johnson agreed to assist in the investigation.

Evans was contacted nine months later, in May of 1986, at which time Johnson and Cormany informed him that they wanted to get an area zoned for the highest density possible and that they were willing to do whatever was needed in order to get the zoning passed. There was also discussion of Evan's campaign for reelection which was just getting off the ground. In response to a query from Johnson about what size contribution would be considered meaningful, Evans replied that at a recent fundraising event, contributors were encouraged to give a thousand dollars apiece. Johnson then asked whether Evans needed any "expense money." Evans stated that he had to order a voter registration list and mailing labels in order to do a precinct mailing. He estimated that it would cost him about $260 and Cormany wrote out a check to Evans for a $300 contribution. Evans used this money to buy the list and sent a thank-you note to Cormany.

In July, 1986, Cormany and Johnson met Evans for lunch and informed him that they had a particular tract of land in mind that they wanted to get rezoned to a higher density. They told Evans that expense monies would be available for Evans if needed. Evans recommended that they meet with members of the DeKalb County Planning Department so they could get their rezoning application filed as soon as possible.

On the morning of July 23, 1986, Evans called Cormany at his undercover apartment. The parties disagree as to whether Evans initiated this call. At trial, Evans testified that he was returning a call that had been placed by Cormany. Cormany testified that the call he received was unsolicited. This call was not recorded. Cormany testified that he did not record the call because he was

not expecting a call at his home and had not set up any recording equipment. Cormany further testified that at the end of the conversation, which concerned the filing of the zoning petition, Evans replied that he was "running hard and pulling teeth." Cormany testified that he thought that Evans's references to his campaign were an attempt to discuss money opportunities with him in connection with his rezoning efforts. Later that day, Cormany and Evans spoke again in order to arrange a meeting for the next day. According to Evans, Cormany also told him to bring an indication of his campaign needs. Cormany denied that he asked Evans to prepare any list. This conversation also was not recorded.

Cormany and Evans met on July 24, at which time Cormany informed Evans that there was a "generous budget for anything we do." Evans then produced a document which he referred to as the "draft constitution of the United States," which contained his campaign budget from June 29 to August 12, the date of the primary. The document apparently showed his outstanding campaign debts as well as an estimate of his anticipated campaign expenses throughout the primary. Evans stated that of his $14,180 budget, he had received $6,295, leaving a shortfall of $7,885. At this point the following conversation ensued:

> Cormany: Can I can I talk frankly with you . . .
>
> Evans: Yeah.
>
> . . . .
>
> Cormany: And, and this is between you and I. I need, I desperately need, your help and your support on this project. You, I'm in one business, you're in another.

Evans: Yeah, yeah you got me.

Cormany: You're, you're the influence you have over there, and the assistance you have over there, I can probably cover that for you.

Evans: Well, let me tell you. I, it's it's cause, see you don't know how I operate. What I'm, what I'm telling you is that, this is what the shortfall is and then you can decide whatever part you want to handle of that.

Cormany: You're talking about seven eight eighty-five.

Evans: Right.

Cormany: That's the balance of what the . . .

Evans: Of what the budget was from June 29th through August 12.

Cormany: But, what I'm asking you John, I mean, is if I pick up the entire amount, I mean, does that, would that satis – would that be a reasonable relationship, a reasonable

. . . .

Evans: Oh, I'll, let me make sure, and I understand both of us are groping . . .

Cormany: Yeah.

Evans: . . . for what we need to say to each other.

Cormany: All I want . . . let me, let me kinda . . .

Evans: I'm gonna work. Let met tell you I'm gonna work, if you didn't give me but three, on this, I've promised to help you. I'm gonna work to do that. You understand what I mean.

Cormany: Yeah.

Evans: If you gave me six, I'll do exactly what I said I was gonna do for you. If you gave me one, I'll do exactly what I said I was gonna do for you. I wanna' make sure you're clear on that part. So it doesn't really matter. If I promised to help, that's what I'm gonna do.

Cormany: I understand.

Evans: You see, what I'm doing is giving you is a fair assessment of what my needs are to be re-elected on August 12.

Cormany: Okay.

After some intermediate conversation, the interchange continued as follows:

Cormany: You need cash?

Evans: Yeah . . .

Cormany: Check?

Evans: I think we better do it that way.

Cormany: Cash?

Evans: Yeah. I think so in this case.

Cormany: Okay.

Evans: I think so, so there won't be any, any, tinges, or anything.

Cormany: Okay.

Evans: Or, we can do this.

Cormany: You, you, tell me how you prefer it done?

Evans: I mean, let me, let me tell ya'.

Cormany: I can write the check . . .

Evans: I know.

Cormany: Or I can give you, I can give you . . .

Evans: Okay, I'll tell you now, we don't have to do that. What you do, is make me out one, ahh, for a thousand.

Cormany: Make you out a check for a thousand?

Evans: And, and that means we gonna record it and report it and then the rest would be cash.

Cormany: The rest will be cash?

Evans: Yeah.

Later in the meeting, the conversation continued as follows:

Cormany: But, I hope you understand that, ahh, just because, you're in an election year that's not the only reason that, I mean we would have a budget either way.

Evans: I understand. Oh, I understand that.

Cormany: And you and I would have a budget either way.

Evans: Either way, yep. Oh, I understand that. I understand.

Later that day, Cormany tried to file the application for rezoning of the property, but the application was rejected because the property had been rezoned less than two years before. Evans and Cormany met on July 25, at which time the conversation centered around whether or not this two-year requirement could be waived. At this meeting, Cormany gave Evans $7,000 in cash, which Evans place in an envelope, and a check for $1,000 payable to the "John Evans Campaign." Evans locked the $7,000 in cash in a drawer in a file cabinet in his campaign office. Evans did not at that time record the $7,000

in cash given to him by Cormany on his books nor on the required state disclosure form. Evans did not report the $7,000 he received from Cormany in his 1986 tax return.

At the August 12 DeKalb County Commission meeting, the waiver was granted by a vote of 4 to 0. On August 27, Cormany filed his application for rezoning. On August 28, Cormany informed Evans that approval of the application would require an amendment to the comprehensive land use plan from low density residential to medium residential.

In early October of 1986, the county's Planning Department recommended denial of Cormany's application to amend the land use plan. On October 28, Cormany decided to end the project by withdrawing the zoning application without prejudice, and the Commission agreed to allow the application to be withdrawn.

On October 7, 1987, F.B.I. Special Agents Clarence Joe Tucker and Gary Morgan interviewed Evans at his office. Evans was informed that the agents wished to ask him about campaign contributions he had received from developers. Evans told agents that Cormany had given him a campaign contribution of $1,000 and that all of the contributions he received from individuals were reflected on his campaign disclosure reports. Evans failed to mention the additional $7,000 in cash that he had received from Cormany.

Testimony at trial indicated that at the end of his campaign. Evans had a surplus of over $7,000 including

the money that he had received from Cormany.[2] He testified that he used $4,100 to repay a campaign debt to his mother, in cash, in November of 1986. He testified that he used the remaining $2,900 to repay himself in December of 1986, for loans that he had made to his own campaign over the years 1982-86. Evans became aware of the undercover investigation in November of 1987. The repayments of loans occurred before Evans became aware of the undercover operation. Evans did not, however, record these payments in his books or amend his state disclosure forms until after he knew that he was under investigation.

DISCUSSION

A. *Instruction to the Jury on the Law of Extortion under Color of Official Right*

Evans claims that the district court's instruction to the jury on Count I, extortion "under color of official right." was erroneous in that it did not require the jury to find that Evans *conditioned* his support for Cormany's project on the receipt of some type of payment from Cormany. In other words, Evans claims that the crime of extortion under color of official-right requires that a public official initiate some action which induces the victim to part with money or property. Upon review of the charge given to the jury, we find that it correctly sets

---

[2] Although Evans had spent almost $7,000 more than the $14,000 projected budget for June 30 to August 12 that he showed Cormany, he had also raised approximately $28,000 ($14,000 more than expected), including the cash contributed by Cormany.

out Eleventh Circuit law on the elements required for conviction of the crime of extortion under color of official right.

The Hobbs Act, 18 U.S.C. § 1951, provides in pertinent part that "whoever . . . affects commerce . . . by . . . extortion shall be fined not more than $10,000 or imprisoned not more than twenty years, or both." Extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

In this case, the judge instructed the jury as follows:

> The defendant can be found guilty of [18 U.S.C. § 1951] only if all of the following elements are proved beyond a reasonable doubt: First, that the defendant induced the person described in the indictment to part with property or money; second, that the defendant did so knowingly and willfully by means of extortion as hereinafter defined; third, that the extortionate transaction delayed, interrupted or adversely affected interstate commerce.
>
> Now, extortion in a case involving a public official means the wrongful acquisition of property from someone else under color of official right.
>
> Extortion under color of official right is the wrongful taking by a public official of money or property not due him or his office whether or not the taking was accompanied by force, threat or the use of fear. In other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion.
>
> So, if a public official *agrees* to take or withhold official action or [sic] the wrongful purpose

of inducing a victim to part with property, such action would constitute extortion even though the official was already duty-bound to take or withhold the action in question.

. . .

The defendant contends that the $8,000 he received from Agent Cormany was a campaign contribution. The solicitation of campaign contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.

However, if a public official demands or *accepts* money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

(emphasis added).

Evans's first contention is that the court erred in using the words "agrees" and "accepts" italicized above. He points out that the Eleventh Circuit Pattern Jury Instruction states that "if a public official *threatens* to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a *threat* would constitute extortion. . . . " Evans claims that the distinction between "threaten" and "agree" is a crucial one: the former, he contends, is a "condition precedent" whereas the latter implies "mere acquiescence." Evans argues that the instruction given by the judge was impermissibly "watered down" because a section 1951 violation

requires that the payment of money be induced, i.e. that the defendant condition the performance of some official act on payment of money. He states that the overall charge in this case eliminated the requirement of inducement.

We agree with Evans's observation that the charge permitted the jury to convict Evans without finding that he conditioned the performance of an official act upon payment of money. Under the law of this circuit, however, passive acceptance of a benefit by a public official *is* sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. The official need not take any specific action to induce the offering of the benefit.[3]

Eleventh Circuit law governing the crime of extortion under color of official right was first set out by the former Fifth Circuit in *United States v. Williams*, 621 F.2d 123 (5th Cir.1980), *cert. denied*, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981).[4] In *Williams*, the court stated that:

---

[3] This is also the law of the majority of circuits that have addressed the question. *See United States v. Aguon*, 851 F.2d 1158, 1177 (9th Cir.1988) (en banc) (Wallace, J. dissenting) (collecting cases). It will remain the law of the Eleventh Circuit unless the Supreme Court or the Eleventh Circuit sitting en banc decides otherwise. Only the Second and Ninth Circuits have required an act of inducement by a public official. *See United States v. O'Grady*, 742 F.2d 682, 687-89 (2d Cir.1984) (en banc) and *Aguon*, 851 F.2d 1158.

[4] The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), adopted as

(Continued on following page)

> The language, "under color of official right," is consonant with the common law definition of extortion, which could be committed only by a public official taking a fee under color of his office, with no proof of threat, force or duress required. The coercive element is supplied by the existence of the public office itself.

Id. at 124 (citations omitted).

Evans argues that the Eleventh Circuit decision of *United States v. O'Malley*, 707 F.2d 1240 (11th Cir.1983) stands for the proposition that inducement is still required in a case involving extortion under color of official right. We agree that *O'Malley* speaks in terms of inducement, but note that the decision makes clear that the requirement of inducement is *automatically* satisfied by the power connected with the public office.[5] Therefore, once the defendant has shown that a public official has accepted money in return for a requested exercise of official power, no additional inducement need be shown. "The coercive nature of the official office provides all the inducement necessary." *Id.* at 1248; *see also United States v. Glass*, 709 F.2d 669, 674 (11th Cir.1983) (coercive nature of official office takes the place of fear, duress, or threat).

In *United States v. O'Keefe*, this circuit reiterated that "[i]n a Hobbs Act prosecution of a public official, the

---

(Continued from previous page)

precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

[5] It appears somewhat academic to argue whether inducement is still required if inducement is automatically present by virtue of the official's position. A condition that is always satisfied ceases to be a true condition.

Government's burden is simple: it must prove that the public official obtained property from another in exchange for performance of his official duties." 825 F.2d 314, 319 (11th Cir.1987); *see also United States v. Sorrow*, 732 F.2d 176, 179 (11th Cir.1984) (compulsion not a necessary element in Hobbs Act prosecution of a public official); *United States v. Swift*, 732 F.2d 878, 880 (11th Cir.1984), *cert. denied*, 469 U.S. 1158, 105 S.Ct. 905, 83 L.Ed.2d 920 (1985) (same).[6]

Evans, while acknowledging that the Fifth Circuit's decision in *United States v. Dozier*, 672 F.2d 531 (5th Cir.), *cert. denied*, 459 U.S. 943, 103 S.Ct. 256, 74 L.Ed.2d 200 (1982), is not binding on this court, relies heavily on that decision for the proposition that extortion under color of official right requires that a public official make performance or non-performance of an official act contingent upon the payment of a fee. While this accurately described the conduct at issue in *Dozier*, that court made clear that the Hobbs Act was not limited to such behavior, but that:

---

[6] The Seventh Circuit, in a case cited with approval in *Sorrow*, 732 F.2d at 180 and in *Swift*, 732 F.2d at 880, upheld a trial court instruction that "[i]f the public official knows the motivation of the victim focuses on the public official's office and money is obtained by the public official which was not lawfully due and owing to him or the office he represented, that is sufficient." *United States v. Hedman*, 630 F.2d 1184, 1194 n. 4 (7th Cir.1980), *cert. denied*, 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981). The Seventh Circuit found that the instruction was not erroneous, stating that "it is unnecessary to show that the defendant induced the extortionate payment." *Id.* at 1195.

> [i]t matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951.

672 F.2d at 539 (quoting *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir.1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1562, 43 L.Ed.2d 775 (1975)); *see also United States v. Westmoreland*, 841 F.2d 572, 581 (5th Cir.), *cert. denied*, 488 U.S. 820, 109 S.Ct. 62, 102 L.Ed.2d 39 (1988) (citing *Dozier* and reiterating that a public official may violate the Hobbs Act merely by accepting money in return for a requested exercise of official power); *United States v. Wright*, 797 F.2d 245, 250 (5th Cir.1986), *cert. denied*, 481 U.S. 1013, 107 S.Ct. 1887, 95 L.Ed.2d 495 (1987) (same). Thus, despite Evans's protestations otherwise, we find the Fifth Circuit's position stemming from its interpretations of the *Williams* decision entirely consistent with that of the Eleventh.

As an alternative argument, Evans requests that this panel revisit the Eleventh Circuit position on extortion under color of official right, suggesting that the circuit's holdings do not comport with the legislative history and plain meaning of the statute, and that Eleventh Circuit precedents such as *O'Keefe* and *O'Malley* conflict and cannot be reconciled. We see no inconsistency in Eleventh Circuit precedent on this question and further note that prior decisions of panels of the Eleventh Circuit may only be overruled by the *en banc* court or the Supreme Court.

See United States v. Machado, 804 F.2d 1537, 1543 (11th Cir.1986).

Evans also contends that the instruction was "so confusing, contradictory and ambiguous" that it deprived him of a fair trial. Specifically, he argues that the charge as given did not provide a clear statement regarding the mens rea required by Evans in that it appeared to focus on the actions and intention of the contributor instead of on the actions and intention of the defendant. He states that the charge would allow the jury to convict regardless of whether Evans knew that Cormany's motivation for giving him the money was an improper one.

In order to secure a conviction under the Hobbs Act, the government must demonstrate, among other things, that the public official *knew* that the payment he received was motivated by a hope of influence. We agree with Evans that the charge given by the court did not express this requirement as clearly as it might have.[7] The court did state, however, that the public official must agree to take official action "for the *wrongful purpose* of inducing a victim to part with property." (emphasis added). Further the instruction on Count I informed the jury of the mens rea required by stating that the government must prove beyond a reasonable doubt "that the defendant induced

---

[7] In *Hedman*, 630 F.2d at 1184 n. 4, the jury was specifically told that they could only convict "[i]f the public official knows the motivation of the victim focused[d] on the public official's office." *See also United States v. Nedza*, 880 F.2d 896, 902 n. 13 (7th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 334, 107 L.Ed.2d 323 (1989). Such an instruction more clearly spells out the mens rea required than the instruction given in this case.

the person . . . to part with property . . . knowingly and willfully by means of extortion. . . . "[8]

The district court has broad discretion in formulating the charge to the jury, and the court of appeals will not reverse "unless, after examining the entire charge, the Court finds that the issues of law were presented inaccurately, . . . or the charge improperly guided the jury in such a substantial way as to violate due process." *United States v. Turner*, 871 F.2d 1574, 1578 (11th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 552, 107 L.Ed.2d 548 (1989). In this case, we find that, taken as a whole, the charge given by the trial judge properly guided the jury and did not offend due process.

B. Admission of the Government Chart into Evidence

Evans claims that the district court erred in admitting a government chart and foundation testimony into evidence that purported to summarize the defendant's finances. The standard regarding determinations of admissibility of evidence is whether there is a clear showing of an abuse of discretion. *United States v. Roper*, 874 F.2d 782, 790 (11th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 369, 107 L.Ed.2d 355 (1989). For the reasons discussed below, we find that the district court acted well within its discretion in admitting the Robertson chart and the accompanying foundation testimony.

At trial, Thomas Huhn, a private investigator, testified as a summary witness for the defense. Huhn stated

---

[8] The court further instructed the jury on the meaning of the words knowingly and willfully.

that he had examined Evans's ledger books, which comprised Evans's office and campaign record keeping system from 1982 to 1987, in order to determine how much money Evans had personally loaned to his campaign or district office and what repayments were made from the office or campaign back to Evans. On the basis of this examination, Huhn prepared a chart ("the Huhn chart"), which was admitted into evidence. Testifying from this chart, Huhn stated that after Evans had repaid himself $2,900 from the Cormany cash, the campaign and district office still owed Evans approximately $1,235 as of December 31, 1987.[9]

The apparent point of Huhn's testimony and chart was to demonstrate that Evans did not report the $7,000 he received from Cormany on his income tax returns because any money Evans had been repaid for his own loans to his office would not be income and therefore would not have to be reported to the I.R.S.[10]

Prior to Huhn's testimony, Evans had testified that DeKalb County paid each commissioner, including Evans, $100 per month for incidental expenses such as parking fees, gas, mileage, lunches, etc. The County did not require the commissioners to designate how this expense

---

[9] Huhn testified that there were approximately 376 entries for loans from Evans to the campaign and district office and a total of 44 repayments from the campaign and district office to Evans.

[10] The court charged the jury that "if you find that the money the defendant received from Cormany was a campaign contribution and that it was used to pay campaign expenses or debts, the defendant was not required to report it as income on his federal income tax return."

money was used. Evans testified that he had not reflected these $100 per month payments from DeKalb County in his office ledger. Instead, he deposited the checks for $100 in his personal account, and he claimed the resulting income of $1,200 per year on his tax return each year as business reimbursements for car related expenses.

In its rebuttal case, the government introduced testimony from Ted Malcolm Robertson, a special agent with the I.R.S. Robertson testified that, in his opinion, the $100 per month that Evans had received during the period 1982 to 1987 should have been reflected in his ledgers in order to arrive at an accurate assessment of the amounts owed to or owing from Evans to his campaign and district office. Robertson stated that he had concluded that every item that had been expensed on behalf of Evans was reflected in Evans's ledger books, including expenses for transportation.[11] Robertson testified that he had made a summary chart ("the Robertson chart") which adopted the figures in the Huhn chart, but added in the $100 per month that Evans had received from DeKalb County. On the basis of this chart, Robertson testified that as of December 31, 1987, Evans actually owed his campaign and district office over $4,700.

According to the government, the Robertson chart was introduced to rebut Evans's reasons for not reporting the money to the I.R.S. by showing that Evans could not have believed that he was merely repaying himself a debt. The government sought to show that at the time

---

[11] Evans had testified that among the items that he included as loans from himself to the campaign were items for car expenses such as gasoline and related matters.

Evans repaid himself, he was not owed any money from his district and campaign office.

Evans objected to Robertson's testimony and to the Robertson chart on several grounds. He claimed that the chart was irrelevant, erroneous, and argumentative, that it did not meet the requirements of Fed.R.Evid. 1006, and that it resulted in a variance as to Count II of the indictment. The district court overruled Evans's objections to the testimony and the chart as well as Evans's motion for a mistrial based on his variance argument.

Evans claims that the Robertson chart was irrelevant because the $100 per month expense money given to each Commissioner by DeKalb County had nothing to do with Evans's office or campaign records or accounts. He claims that the chart was erroneous because the government was allowed to insert the $100 per month payments into Evans's bookkeeping system for his office without taking into account any of the expenses for which the money was used. Evans argues strenuously that the record demonstrates that he used the $100 per month for car expenses and that he accordingly expensed the $100 per month on I.R.S. form 2106 as an employee business expense. He points out that the evidence showed that he did not claim depreciation, mileage, insurance, gasoline, oil or other expenses on his cars from his campaign and district office account, and that Robertson himself admitted on cross examination that he had not found a single charge in the campaign and district office records for such expenses for any car driven by either Evans or his wife, who served as his campaign manager. Evans claims that as a result of Robertson's testimony, the jury was erroneously led to believe that Evans had repaid himself

$6,000 more from his office and campaign loans than was the case.

Finally, Evans claims that the chart was argumentative because the government labeled the DeKalb County money "*re* payments" to Evans to make it correspond to the other repayments Evans received for his loans to his campaign and district office, even though there was evidence that the money was not used in this manner. He argues that he had demonstrated that the DeKalb County money was not a repayment but rather an advance for routine expense payments.

We agree with Evans that the testimony by Robertson was contradicted by other evidence at trial. We find, however, that this does not render the admission of the government's evidence irrelevant or erroneous. In an adversarial proceeding, it is not unusual for testimony offered by one side to be contradicted by testimony offered by the opposing side.[12] Here, the jury was presented with the evidence of both sides and was allowed to draw its own conclusions as to whether the $1,200 per year should have been added to the defendant's summary of the repayments made to himself from his campaign and district office. Evans had the opportunity,

---

[12] In his briefs before this court, Evans states that "the government knew that its initial premise attempting to justify the infusion of the $6,000 into Evans' campaign and office account was in fact false" and that "the government's efforts can only be characterized as disingenuous sleight-of-hand to irreparably sabotage the defendant's theory of the case." Despite such assertions, we do not understand Evans to be raising the claim that the government knowingly used perjured testimony.

through cross examination and surrebuttal,[13] to demonstrate that the government's theory was false. The fact that the government tenders unpersuasive evidence does not mean that the admission of evidence was error. Indeed, trial counsel may have been able to turn the tables on the government by showing that the government was putting forth a theory that lacked foundation.

Evans also argues that the chart was not a "summary" within the meaning of Fed.R.Evid. 1006[14] because the DeKalb County payments were not so voluminous that they could not conveniently be examined in court.

Evans is constrained to argue only that the *additional* payments of $1,200 were not a "summary" because, of course, the chart, minus those payments, had already been admitted as a summary chart during presentation of the defense. We find that the district court did not abuse

---

[13] After the close of evidence, defense counsel argued that it should be allowed to recall Evans in surrebuttal to challenge testimony on this point. Over the government's objection, the court ruled that it would allow Evans to retake the stand for the limited purpose of explaining how he spent the $1,200 he received each year from DeKalb County to defray his expenses. Counsel then decided not to proceed with any surrebuttal.

[14] Fed.R.Evid. 1006 states:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

its discretion in admitting the chart as a summary, as it brought together a total of sixty $100 per month payments that Evans received over a five year period.

Finally, Evans argues that the testimony of Agent Robertson set forth an impermissible variance from the charge and the proof. Robertson testified, based on the chart, that when the DeKalb County payments were included, Evans had already taken over $1,100 of undeclared income without regard to what he did with $2,900 from the cash given to him by Cormany. Evans claims that if this evidence were accurate, the jury could believe Evans's testimony as to what he did with the Cormany cash and still convict him.

In *Stirone v. United States*, 361 U.S. 212, 215-16, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960), the Supreme Court stated that the grand jury's charges may not be broadened through amendment except by the grand jury itself. We conclude that *Stirone* has no bearing on the case before us, as it speaks to the situation in which the trial court gives an instruction which expands the jury charge to include additional illegal acts not charged in the indictment. In the instant case, the judge specifically instructed the jury that "the defendant is not on trial for any other specific offense not charged in the indictment."[15]

---

[15] Count II of the indictment charged in relevant part that Evans filed a tax return "he did not believe to be true and correct as to every material matter in that . . . the Evans's adjusted gross income in 1986 was at least $35,739.67 *as a result of a $7,000 cash payment he received from Clifford Cormany a/k/a Steve Hawkins.*" (emphasis added).

In *United States v. Gold*, 743 F.2d 800 (11th Cir.1984), *cert. denied*, 469 U.S. 1217, 105 S.Ct. 1196, 84 L.Ed.2d 341 (1985), we made clear that "properly understood . . . a variance exists where the evidence at trial proves facts *different* from those alleged in the indictment, as opposed to facts which, although not specifically mentioned in the indictment, are entirely consistent with its allegation." *Id.* at 813 (emphasis in original); *see also United States v. Champion*, 813 F.2d 1154, 1168 (11th Cir. 1987) (government's evidence related to uncharged shipments of marijuana during time of indicted conspiracy did not constitute impermissible variance from the indictment). Here, there was no variance warranting a mistrial and the district court properly denied the motion.

C. *Refusal to give an Entrapment Charge on the Tax Fraud Count*

Evans claims that the district court erred in refusing to charge the jury on entrapment with respect to Count II of the indictment, which charged Evans with subscribing to a false tax return for 1986.[16]

A defendant is entitled to have presented instructions relating to a theory of defense "for which there is *any foundation* in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Lively*, 803 F.2d 1124, 1126 (11th Cir.1986) (quoting *United States v. Young*, 464 F.2d 160, 164 (5th Cir.1972) (emphasis added)). In order to raise the issue of entrapment, a defendant must come

---

[16] An entrapment charge was given on Count I.

forward with some evidence that "the government's conduct created a substantial risk that the offense would be committed by a a person other than one ready to commit it." *United States v. Parr*, 716 F.2d 796, 802-03 (11th Cir.1983) (citations omitted); *United States v. Andrews*, 765 F.2d 1491, 1499 (11th Cir.1985), *cert. denied*, 474 U.S. 1064, 106 S.Ct. 815, 88 L.Ed.2d 789 (1986). Therefore, in reviewing a district court's failure to instruct the jury on a theory of entrapment, we look to see whether the court correctly concluded that the defendant failed to present more than a scintilla of evidence in support of an entrapment defense.

Evans first contends that the evidence that was sufficient to authorize the entrapment charge on the extortion count (Count I) would also authorize it on the count of failure to report $7,000 as income (Count II). Evan's argument appears to be that when he was entrapped into extorting the money, he was simultaneously entrapped into not recording $7,000 of it as a campaign contribution. He goes on to argue that once he decided not to record that money as a campaign contribution, he was "logically" foreclosed from disclosing it to the I.R.S. We find this argument, though creative, to be without merit. First, while there may be evidence sufficient to support a charge of entrapment on the general offense of extortion, there is no evidence that the government played any role in Evans's decision, after receiving the $8,000, to record only $1,000 as a campaign contribution. Even if such evidence existed, Evans's subsequent decision not to declare the additional $7,000 on his income tax form was wholly separate from his decision not to record it in this campaign ledgers. Thus, we find that the giving of an

entrapment charge on Count I in no way required the court to give an entrapment charge on Count II.

Evans also argues that his entrapment defense is supported by the transcript of his July 24, 1986, meeting with Cormany at which Cormany requested that the payment not be disclosed. Evans contends that when he responded that he would not disclose the $7,000, he "clearly signaled his future intention with regard to disclosure to the I.R.S."

We need not reach the question of whether a mere request by a government agent not to disclose money to the I.R.S. would provide a sufficient basis for an entrapment charge, for our review of the transcript and the videotape convinces us that Cormany made no such request.[17] Although Cormany requested that Evans not

---

[17] The transcript of the conversation, in relevant part, was as follows:

> Cormany: Okay. Now this, listen, when I say this is between you and I . . .
>
> Evans: Okay.
>
> Cormany: . . . John, let me tell you something, I mean . . .
>
> Evans: Won't say a word
>
> Cormany: I don't mean Al [Johnson], I mean, I prefer to have it that way. Not that I don't trust Al.
>
> Evans: Period. No, no, no.
>
> Cormany: And, and . . .

(Continued on following page)

inform anyone of the transaction, at no point did Cormany suggest or request that Evans not report the money to the I.R.S. in his tax return. Thus, there is no basis to conclude that Cormany's request for confidentiality "created a substantial risk that the offense would be committed by a person other than one ready to commit it." *Parr*, 716 F.2d at 802-03. We hold that the district court correctly ruled that Evans's showing of entrapment was insufficient as a matter of law to send the issue to the jury and that it did not err in refusing to give an entrapment charge with respect to Count II.

(Continued from previous page)

Evans: Period.

Cormany: Bob [Howard] don't need to know.

Evans: Nobody.

Cormany: Okay?

Evans: You can count on it.

. . . .

Cormany: I just saw, ah, Al show up, so this . . .

Evans: Oh.

Cormany: . . . This is between you and I.

Evans: No problem.

Cormany: Then, I mean. My accountant will find out I made a thousand dollar contribution from my check book.

Evans: Yeah, fine, fine.

Cormany: We got so much, so many different accounts and everything, I mean, you know . . .

Evans: (Laughs)

Cormany: He won't, he won't even miss the rest of it.

D. Exclusion of Testimony by Dr. Robert Shuy

Evans's final claims concern two evidentiary rulings by the district court limiting the evidence that the defense was allowed to put before the jury.

First, Evans argues that the district court abused its discretion in refusing to permit the defense expert on linguistics, Dr. Roger W. Shuy, to assist the jury in examining in court the eighteen tapes admitted into evidence. Dr. Shuy was presented as an expert in the field of conversation or discourse analysis. The defense offered Dr. Shuy to testify about the structure of conversation including such concepts as "topic isolation," "response analysis," "feedback markers," and the "contamination principle."[18] The defense also sought to introduce, pursuant to Fed.R.Evid. 1006, five charts showing Dr. Shuy's conclusions about certain "themes" that recurred throughout the conversations. The court ruled that Dr. Shuy would not be permitted to testify.

Evans claims that the testimony would have helped the jury determine whether it was more or less probable that Evans understood the illegal nature of the plan through reference to specific taped conversations. As far

---

[18] At the trial court's evidentiary hearing on the proffer of this evidence, Dr. Shuy testified that "topic analysis" refers to identification of the major themes of the speakers in the conversation which indicate the agenda of the speakers, that "feedback markers" are responses such as "Uh huh" which may or may not mean "I agree with what the speaker is saying," and that the "contamination principle" is the process by which a listener becomes contaminated in the eyes of a third party listener/observer by the actions of the speaker.

as the summary was concerned, Evans argues that the only way to review multiple and lenthly tape sequences is by means of a chart or summary. He notes that the expert was able listen to the tapes repeatedly, whereas the jury heard the tapes only once at trial. He argues that the summary charts, which dealt with broader themes over a period of time, could only be assembled after an extensive review that no jury would have the ability to undertake.[19]

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence.[20] Under this rule, prior to admitting expert testimony, "the trial judge must determine that the expert testimony will be relevant and will be helpful to the trier of fact." *United States v. Piccinonna*, 885 F.2d 1529, 1531 (11th Cir.1989) (en banc) (footnotes omitted). We have stressed that, in deciding whether to admit testimony, "a trial judge must be sensitive to the jury's temptation to allow the judgment of another authority to substitute for its own." *United States v. Sorondo*, 845 F.2d 945, 949 (11th Cir.1988).

---

[19] As an example, he notes that a summary would have demonstrated that Cormany or Al Johnson offered Evans money at thirty different times over the course of the investigation.

[20] Fed.R.Evid. 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In this case, the district court held an extensive evidentiary hearing regarding the defendant's proffer of Dr. Shuy's testimony. In deciding not to admit the testimony, the court concluded that while a jury in an appropriate case might be aided by testimony from a linguistic expert, the case at bar was not appropriate for such testimony. The court based this conclusion on several grounds. First, it noted that the recordings and transcripts that formed the basis of Dr. Shuy's conclusions were in evidence, had been played and read in court, and could be played and read again by the jury during deliberations. The court also found that the expert's testimony would not assist the jury because the subject matter of the testimony, conversation, was one which could be expected to be within the general knowledge of jurors. Finally, the court found that the testimony could be confusing and misleading to the jurors because it took matters out of context and, in some instances, was in the nature of conclusions regarding the appropriate interpretations to make of the recorded conversations.

We hold that the district court acted within its discretion in excluding Dr. Shuy's testimony. In considering whether the expert would aid the jury's ability to understand the taped conversations and whether the danger of jury confusion outweighed the testimony's probative value, the court engaged in the correct inquiry. *Cf. United States v. Schmidt*, 711 F.2d 595, 598 (5th Cir.1983), *cert. denied*, 464 U.S. 1041, 104 S.Ct. 705, 79 L.Ed.2d 169 (1984) (refusal to admit expert testimony of linguistics expert not an abuse of discretion where court concluded that testimony would not assist jury); *United States v. Devine*, 787 F.2d 1086, 1088 (7th Cir.), *cert. denied*, 479 U.S. 848, 107

S.Ct. 170, 93 L.Ed.2d 107 (1986) (not error to refuse to admit linguist's testimony where contents of tape recorded conversation not outside the average person's understanding); *United States v. DeLuna*, 763 F.2d 897, 912 (8th Cir.), *cert. denied*, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985) (no error to refuse proffered expert testimony on discourse analysis). Further, our review of the evidentiary hearing on the admissibility of the expert testimony convinces us that the district court's findings on these matters were well supported. In this case, questions regarding the defendant's understanding of the illegality of the operation and the extent of government inducement were at the center of the trial. The jury's task was to determine, on the basis of its collective experience and judgment, what Evans's state of mind was when he accepted the money and whether he was entrapped into committing the crime for which he was charged. We agree with the district court that expert testimony would not have aided the jury in performing this task and that the testimony presented a risk that the jury would allow the judgment of the expert to substitute for its own.

In refusing to admit the expert's charts as a summary pursuant to Fed.R.Evid. 1006, the court found that certain of the headings of the charts impermissibly reflected the expert's opinion as to the content of the recorded testimony that had previously been presented to the jury. We hold that the district court did not abuse its discretion in refusing to admit the proffered charts on this basis, as a summary of the tapes would necessarily entail judgments about the content of the conversations.

E. Refusal to Allow Cross-Examination of Agent Cormany on the Attorney General's Guidelines on F.B.I. Undercover Operations

Evans also claims that the district court abused its discretion in prohibiting cross-examination of Agent Cormany on the Attorney General's internal guidelines on F.B.I. undercover operations. Evans argues that such an examination would have aided the jury in deciding whether he was entrapped, as it would have shown the degree to which the F.B.I. strayed from the regulations that should have governed its conduct. He argues that the guidelines provide standards to assist the jury in evaluating whether or not the government adhered to minimum standards of fairness.

Evans admits that this is not a case where an agency is required to adhere to its own regulations under penalty of having its actions nullified. *Cf. United States v. Pacheco-Ortiz*, 889 F.2d 301, 307-11 (1st Cir.1989) (discussing judicial sanctions for Department of Justice's failure to follow internal guidelines regarding warnings to targets called before the grand jury). He argues, however, that the government should not be permitted to conceal from the jury the F.B.I's violation of its own rules in an effort to snare a citizen.

We conclude that these guidelines were not of sufficient relevance to the jury's determination on the question of entrapment to warrant their admission. The defense of entrapment concerns only the defendant's lack of predisposition to commit the crime. "Where a defendant is predisposed to commit a crime, he cannot be entrapped, regardless of how outrageous or overreaching

the government's conduct may be." *United States v. Rey*, 811 F.2d 1453, 1455 (11th Cir.), *cert. denied*, 484 U.S. 830, 108 S.Ct. 103, 98 L.Ed.2d 63 (1987) (*citing Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976)). Given the guidelines' lack of probative value on the issue of entrapment, we hold that the district court's decision to disallow cross-examination was not an abuse of discretion.

CONCLUSION

For the foregoing reasons, the defendant's convictions on both counts of the indictment are AFFIRMED.

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 89-8631

D.C. Docket No. CR 88-269A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN H. EVANS, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

Before KRAVITCH and COX, Circuit Judges, and DYER, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgments of

conviction of the said District Court in this cause be and the same are hereby AFFIRMED.

Entered: September 6, 1990
For the Court:
Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: SEP 28 1990

SUPREME COURT OF THE UNITED STATES

No. 90-6105

John H. Evans, Jr.,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 3, 1991
